The Legal 500 Country Comparative Guides

Denmark: Merger Control

This country-specific Q&A provides an overview of merger control laws and regulations applicable in Denmark.

For a full list of jurisdictional Q&As visit here.
1. **Overview**

The Danish merger control regime is governed by the Danish Competition Act, which to a large extent is based on the principles of EU merger regulation. The rules on merger control are administered by the Danish Competition and Consumer Authority (the DCCA) and the Danish Competition Council (the Council). The DCCA is the primary enforcer of the Competition Act in Denmark and decides most cases on behalf of the Council, whereas more complex phase II-cases are decided by the Council.

Under Danish merger rules, filing of a merger is mandatory if the jurisdictional thresholds are met. A merger which meets the Danish thresholds and is thus subject to scrutiny may not be implemented prior to clearance by the Danish competition authorities.

Though not mandatory, parties to a potential merger in Denmark are strongly encouraged to contact the DCCA before filing the notification in order to initiate pre-notification discussions on an informal basis. In practice, a pre-notification period may often last at least two to three weeks in simple cases, and four weeks or considerably longer in more complex cases.

However, while the discussions can be quite extensive and may last several months, in particular in complex merger cases, pre-notification discussions significantly increase the likelihood of the merger being cleared in Phase I.

2. **Is notification compulsory or voluntary?**

Prior notification to the DCCA is mandatory if the jurisdictional thresholds are met.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

Under Danish merger rules, it is prohibited to implement a merger prior to approval by the Danish competition authorities. Implementation of a merger prior to obtaining an approval from the DCCA may result in a penalty.

However, the implementation prohibition does not prevent the implementation of a public takeover bid or a series of transactions in securities, including securities that can be converted to other securities which can be traded in a market such as a stock exchange, whereby control is acquired from different sellers, provided that the merger is notified immediately to the DCCA and the acquirer does not exercise the voting rights attached to the securities in question or only does so to maintain the full value of his investment and on the basis of an exemption granted by the DCCA.

Moreover, the DCCA may exempt a merger from the prohibition to implement a merger before obtaining clearance if the DCCA finds that effective competition will not be impeded.
It is not possible to avoid breaching the prohibition by “carving out” the assets and legal entities of the target, as a transfer of assets, in so far as the assets allow the purchaser to develop a market presence, will be subject to the Danish merger rules itself.

Case law on pre-implementation in Denmark is scarce. However, on 31 May 2018 the ECJ rendered a preliminary ruling in C-633/16 Ernst & Young concerning the prohibition against merger implementation prior to clearance – so called “gun-jumping”. The ECJ held that the termination of a cooperation agreement does not constitute an implementing action covered by the prohibition. The ECJ stated that a merger is implemented only by a transaction, which – in whole or in part, in fact or in law – contributes to the change in control of the target undertaking.

However, at the same time the ECJ underlined the interaction between the EU merger regulation (Regulation 139/2004) and Regulation 1/2003 and made it clear that non-gun jumping behaviour may violate Article 101 and/or 102 TFEU despite not breaching the prohibition against pre-implementation.

In a recent case from 29 May 2019 Circle K, a provider of gas stations, was fined DKK 6 million for ‘gun jumping’ by not notifying the purchase of all assets attached to the operation of 72 Danish gas stations under the Shell brand name. The acquisition of the 72 gas stations was found to have been outside the scope of the EU Commission’s previous approval of Circle K’s acquisition of parts of Shell’s Danish activities.

Finally, on 20 June 2018, two Danish energy suppliers were fined DKK 4 million each for failure to notify a joint acquisition of a third undertaking back in 2010.

4. **What are the conditions of the test for control?**

A merger must be notified to the DCCA where:

- the combined aggregate turnover in Denmark of all the undertakings concerned is at least DKK 900 million and the aggregate turnover in Denmark of each of at least two undertakings concerned is at least DKK 100 million; or
- the aggregate turnover in Denmark of at least one of the undertakings concerned is at least DKK 3.8 billion and the aggregate world-wide turnover of at least one of the other undertakings concerned is at least DKK 3.8 billion.

No form of local presence is required in order for a transaction to be subject to Danish merger rules as long as the jurisdictional turnover thresholds in Denmark are met.

The aggregate turnover of an undertaking is assessed at group level, i.e. it consists of the turnover of the parent company, subsidiaries, and affiliated companies. Intra-group turnover, however, is excluded. For central authorities, according to the Executive Order on calculation of turnover in the Competition Act, turnover shall be replaced by
the aggregate gross operational expenditure in the preceding accounting year of the
ministerial province concerned.

The turnover thresholds refer to revenue from all lines of business and not just revenue
from the product markets directly influenced by the merger. However, if the
transaction consists in acquiring control over part of one or more undertakings, the
turnover threshold of the target company refers only to the parts which are the subject
of the transaction.

As a main rule, the same jurisdictional thresholds apply to all sectors. However,
mergers between providers of telecommunications (which are not, as such, subject to
scrutiny under the Danish Competition Act) must be notified to the Danish Business
Authority if the participating undertakings have a combined turnover in Denmark of at
least DKK 900 million and the merger includes a public telecommunications network.
The individual DKK 100 million turnover threshold does not have to be met in such
cases.

5. **What are the conditions on minority interest in your jurisdiction?**

The aggregate turnover of a party participating in the merger is calculated on the basis of the
company’s latest audited annual account.

The aggregate turnover in Denmark includes the net turnover from the sale of goods and
services to customers who resided in Denmark at the time of the sale. Any turnover from
intra-group sales, however, is excluded.

The DCCA follows the general EU principles for accounting measures for valuation of assets.

6. **Is there a particular exchange rate required to be used for turnover thresholds and
asset values?**

Turnover, including assets, calculated in foreign currency is to be converted into Danish
currency (DKK) according to the average exchange rate in the company’s most recent
financial year.

The average applicable exchange rates in 2018 were EUR 100/DKK 745.32 and USD 100/DKK
631.46.

7. **Do merger control rules apply to joint ventures (both new joint ventures and
acquisitions of joint control over an existing business)?**

Danish merger rules apply to transactions whereby a full-function joint venture is created on
a lasting basis, or whereby a lasting change of control over an existing business creates a full-function joint venture.

According to judgment of the ECJ in case C-248/16, *Austria Asphalt*, the creation of a joint venture shall, in either way, be subject to merger control only if it performs on a lasting basis all the functions of an autonomous economic entity. This involves that the joint venture must act independently of its parent companies and thus have its own access to or presence on the market.

Prior to this ruling, the DCCA – similarly to the European Commission – held that a change from sole control to joint control of an existing undertaking was subject to merger control regardless of whether the full-function joint venture would perform on a lasting basis all the function of an autonomous economic entity. It may be expected that ECJ’s judgment will affect the Danish merger regime.

8. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

   “Foreign-to-foreign” transactions, i.e. where the legal entities acquiring and being acquired are all located outside Denmark, are equally caught by Danish merger control rules in so far as the merging parties meet the Danish turnover thresholds in Denmark.

9. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

   Not applicable.

10. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**

   In essence, the substantive test applied by the DCCA to assess whether or not to clear a merger is whether the merger will significantly impede effective competition, in particular due to the creation or strengthening of a dominant position. When carrying out merger control, the DCCA will in general apply the same tests as the Commission.

   Thus, the Commission’s merger practice and relevant case law from the EU Courts will apply. The Commission’s guidelines on the assessment of horizontal mergers as well as non-horizontal mergers will also provide an important contribution to the interpretation of the DCCA’s merger assessments.

   Historically, the Council and the DCCA seemed to apply a more static, market-share based approach to findings of dominance and unilateral effects compared to the Commission. Over the last few years, however, there has been a change towards a more economic approach, and recent merger decisions thus show an increasing use of economic evidence such as
diversion ratios and upward pricing pressure (UPP) calculations.

Furthermore, public statements from the DCCA indicate that the use of diversion ratios and UPP calculations is becoming the new standard in cases concerning consumer related markets, and that diversion ratios and UPP calculations may also be used for the purpose of defining the relevant markets. Nonetheless, during the initial assessment of a merger, the classic approach of defining markets and calculating market shares is still applied. The initial test may then be supplemented with a more economic assessment in case the DCCA finds that the merger could potentially give rise to concerns.

In general, the same substantive test applies to all sectors. However, it should be noted that mergers between providers of telecommunications (which do not meet the normal thresholds for merger control, cf. above) must be notified to the Danish Business Authority if the parties have a combined turnover in Denmark of at least DKK 900 million and the merger includes a public telecommunications network. The Danish Business Authority will consider whether such merger cases should be referred to the DCCA for further assessment. If a merger is referred to the DCCA, the DCCA will apply its usual substantive test applicable to all mergers.

11. **Are non-competitive factors relevant?**

   No.

12. **Are ancillary restraints covered by the authority’s clearance decision?**

    Ancillary restraints are covered by the DCCA’s clearance decisions, but the DCCA is not obliged to carry out an assessment of such restraints. Consequently, the parties themselves must assess whether the individual terms of the merger agreement can be categorized as ancillary restraints. Practice in Danish and EU merger decisions as well as the Commission’s Notice on ancillary restraints serve as guidance.

    The Council may, upon request from the parties, carry out an assessment of ancillary restraints when assessing the merger itself if the merger involves restraints giving rise to actual uncertainty, and such restraints have not been dealt with either in practice or by the Commission’s Notice. If the Council carries out an assessment of the ancillary restraints, the merger notification cannot be processed under the simplified procedure.

    Depending on the circumstances, permissible ancillary restraints may include certain non-competition clauses, licence agreements, and purchase and supply obligations.

13. **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**
A notification may be made once the parties have signed a merger agreement and must be made before the merger is implemented.

14. **What is the earliest time or stage in the transaction at which a notification can be made?**

In principle, the earliest time for notification is at the time when the parties have signed the merger agreement.

However, the parties are encouraged to contact the DCCA prior to submitting the notification (pre-notification). During the pre-notification phase, the DCCA may give its preliminary view on the merger and express potential concerns, thereby enabling the parties to address such concerns in advance. Pre-notification discussions may also reduce the number of questions asked by the DCCA after filing, thus increasing the likelihood of approval in Phase I.

In practice, the pre-notification phase will last at least two to three weeks in simple cases, and four weeks or more in more complex cases. Recently, we have seen cases where the pre-notification phase has lasted up to six months and where Phase I thus did not commence until the DCCA had no more questions and practically all of the case analysis had already been carried out. Consequently, in some cases the pre-notification phase essentially corresponds to a Phase I and a Phase II review.

15. **What is the basic timetable for the authority’s review?**

The DCCA’s review is divided into a Phase I and a Phase II. Phase I begins once the notification has been deemed complete by the DCCA which includes, among other things, the receipt of the filing fee. See further about filing fees in Question 25.

If the parties submit a simplified notification form, the DCCA will have 10 business days to determine whether the merger meets the requirements for a simplified notification. If this is the case, the merger will be deemed complete at the expiry of the 10-day time limit at the latest. If necessary, the DCCA may request further information from the parties within the 10-day time limit. If the DCCA finds that the merger does not meet the requirements, the parties must submit a full notification.

The DCCA will also have 10 business days to determine whether a full notification is complete. If necessary, the DCCA may request the parties to submit further information within the 10-day time limit, in which case the merger will not be deemed complete until the DCCA receives this information (and perhaps further information as well).

Once the notification is deemed complete and Phase I commences, the DCCA will have 25 business days to determine whether the merger can be approved. Phase II begins if the DCCA
decides to initiate further investigations of the merger. In Phase II, the DCCA will have 90 business days from the time of the decision to initiate further investigations to determine whether the merger should be approved or prohibited.

If the DCCA does not make a decision within the relevant time limit, this will be considered to be a decision to approve the merger.

In a recent case from February 2019, Royal Unibrew acquired sole control of Bev.Con Aps, the sole shareholder of Cult A/S. Both parties were active on the market for production, distribution and sale of energy drinks, “ready-to-drink” and cider in Denmark. Despite the parties’ high post-merger market shares (30-40 %), which caused the merger to undergo a Phase II investigation, the DCCA approved the merger unconditionally. The DCCA did not find that the merger would significantly impede competition as the market was dynamic with low entry barriers, low brand loyalty and constant introduction of new products.

Another merger which was approved with the reasoning that the parties were not close competitors was the merger between the two ferry services Molslinjen A/S and Danske Færger A/S. The merger underwent Phase II but the DCCA found that the merger would not result in significant changes to the competitive situation in the market and did not significantly impede competition.

16. **Under what circumstances the basic timetable may be extended, reset or frozen?**

The time limit under Phase I may be extended from 25 to 35 business days if one or more of the participating undertakings propose commitments, including revised commitments.

The 90-day time limit under Phase II may be extended by to 20 business days if one or more of the participating undertakings propose commitments, including revised commitments. The time limit may only be extended if, at the time when the commitments are proposed, less than 20 business days remain until a decision should have been made under Phase II.

The time limit under Phase II may also be extended upon a decision from the DCCA if one or more of the parties request or consent to the extension, which may not exceed 20 business days.

The time limits may be suspended if one of the participating undertakings files a complaint to the Danish Competition Appeals Tribunal concerning the administrative procedure, until the Appeals Tribunal has rendered a decision on the complaint.

17. **Are there any circumstances in which the review timetable can be shortened?**

In general, it can be expected that the formal review timetable will be shortened if the parties initiate pre-notification discussions with the DCCA. However, the actual total processing time
is probably largely unaffected, as a good part of the DCCA’s review is simply performed during the pre-notification stage.

18. **Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**

Both parties to the merger are responsible for submitting the notification in the sense that both parties can be penalised for failure to file a merger. However, in practice, one of the parties will usually assume the responsibility of preparing and submitting the notification to the DCCA.

19. **What information is required in the filing form?**

The parties generally have to submit information about the companies involved in the transaction and provide a comprehensive description of the merger, including an assessment of the merger’s impact on the relevant market(s). Furthermore, the parties are required to submit information regarding the competition on and access to the relevant market(s).

The DCCA can generally require additional information about the transaction if the notification proves to be unsatisfactory.

In some cases, the parties may use the simplified procedure (short-form filling) instead of a full form notification (standard filing). The simplified procedure requires less information to be provided to the DCCA.

If the simplified procedure is applicable, the parties are not required to provide an extensive and thorough assessment of the general terms of the merger or the general market conditions. However, the DCCA enjoys a wide margin of discretion when deciding whether a merger can be submitted under the simplified procedure or not.

Moreover, under both the simplified and the full-form procedure, the DCCA enjoys a wide margin of discretion when deciding which specific information is required. Finally, even if the requirements for submitting a simplified notification are fulfilled, the DCCA may, e.g. due to the mere size of the parties, still require a full-form notification, which will trigger an enhanced filling fee. See further about filling fees in Question 25.

20. **Which supporting documents, if any, must be filed with the authority?**

The parties will have to enclose the following documents when submitting the notification:

- the most recent audited annual financial statements and annual reports for each of the parties to the merger;
- copies of the final or most recent versions of all documents concerning the merger,
regardless of whether the merger is brought about by agreement between the parties to the merger, acquisition of a controlling interest or a public takeover bid;
- analyses, reports, minutes of board meetings and similar documents related to the merger;
- flowcharts and similar overviews for each of the parties to the merger;
- a non-confidential version of the notification;
- documentation of payment of the merger fee; and
- a signed declaration in which the notifying party declares that the information stated in the notification is correct.

The documents may usually be provided by both parties to the transaction, and must be submitted in Danish, or in English if permitted by the DCCA.

21. **Is there a filing fee? If so, please specify the amount in local currency.**

   The filing fee for the simplified procedure is DKK 50,000.

   The filing fee for a standard filing is 0.015% of the parties’ combined turnover but will in no case exceed DKK 1.5 million.

   A standard filing will have to be paid if the DCCA require a full-form notification, also if it would otherwise qualify for a simplified procedure.

22. **Is there a public announcement that a notification has been filed?**

   Once the parties have made a notification to the DCCA, a press release will be published on the DCCA’s website. Furthermore, a press release will be published on the DCCA’s website when a merger has been approved or prohibited.

23. **Does the authority seek or invite the views of third parties?**

   During the assessment of the merger, the DCCA will generally invite any one interested (primarily customers, suppliers and competitors) to comment on the proposed merger. However, when the simplified procedure is applied, the DCCA will usually depend solely on the information submitted by the parties.

24. **What information may be published by the authority or made available to third parties?**

   The pre-notification phase is confidential, and no documents or information will be published, should the merger be cancelled by the parties.

   The notification in itself (including supporting documents) will not be published on the
DCCA’s website, but the DCCA will issue a press release shortly after receiving notification of a merger, which generally includes information such as the names of the parties, the type of transaction, and the relevant market(s).

If the DCCA carries out market tests etc., the DCCA may make a non-confidential version of the notification available to third parties.

A non-confidential version of the DCCA’s merger decision is published on its website shortly after a decision has been made.

25. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

Under the EU merger control rules, the DCCA is obliged to cooperate with the Commission. Moreover, the DCCA cooperates with national competition authorities in other EU member states when a merger is subject to review in more than one member state. The parties to the merger will have to consent to the exchange of any confidential information between the national competition authorities.

26. **What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

In general, the DCCA can require the parties to take appropriate measures – structural or behavioural – in order to secure stable and efficient competition. The remedies acceptable to the DCCA include a full or partial disposal of assets, companies, subsidiaries and other proprietary interests.

Furthermore, the DCCA can request the parties to grant third party access to any supply systems, production machinery or distribution channels. As in the EU, the DCCA has a preference towards structural remedies as opposed to behavioural remedies, and in recent practice behavioural remedies are generally only used in combination with structural remedies.

The DCCA recently provided a model text for Divestiture Commitments and a separate model text for Trustee Mandate. Use of the model texts is not mandatory – they are intended to serve as guidance in preparing divestiture commitments and to ensure that the parties include all the relevant data when proposing commitments.

In November 2018 the DCCA approved a merger between Tryg Forsikring A/S and the insurance company Alka with behavioural commitments. Both undertakings provide products and services in the market for property and casualty insurance for private customers. The DCCA had concerns that the merger would lead to significant restrictions to the competition on the market for private non-life insurance. In order to meet the concerns of the DCCA the
following three commitments where made with a duration of five years: i) to terminate exclusivity clauses in some customer agreements, ii) to refrain from charging customers a fee when terminating their private insurance policies, iii) to annually pay 5 million Danish kroner to Forsikringsguiden (which is an independent insurance and price comparison website).

Another case where commitments were made involved a merger between Global Connect A/S and Nianet A/S from May 2018. The parties were active in the market for wholesale and retail supply of broadband connections via fibre-optic infrastructure. The DCCA found that the merger would give rise to unilateral effects in the market for provision of colocation services in the Aarhus area, resulting in higher prices. To meet the DCCA’s concern, Global Connect committed to divest two data centres in the Aarhus area owned by Nianet.

27. **What procedure applies in the event that remedies are required in order to secure clearance?**

If the DCCA finds that a merger gives rise to concerns, the parties may propose remedies in order to obtain an approval. Remedies should preferably be offered as early as possible. Remedies offered late in Phase II will extend the time frame of Phase II in order to grant the DCCA at least 20 business days to assess the remedies. The offered remedies will usually be market tested.

28. **What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

The parties will be punished with fines if they;

- fail to notify a merger/implement a merger prior to clearance;
- fail to submit a full-form notification within ten business days upon request from the DCCA in a situation where the DCCA has first approved a merger under the simplified procedure, but the approval was based on the parties’ submission of incorrect or misleading information;
- implement a merger despite a prohibition against implementation;
- fail to comply with a condition imposed or order issued by the DCCA as a precondition for approving the merger; or
- fail to comply with a requirement to separate undertakings or assets that have been taken over or merged or a requirement of cessation of joint control or any other measure capable of restoring competition when the DCCA has decided to prohibit a merger which has already been implemented.

On 20 June 2018, two Danish energy suppliers were fined DKK 4 million each for failure to notify a joint acquisition of a third undertaking back in 2012. In setting the fine, it was considered a mitigating circumstance that the undertakings informed the DCCA themselves of the breach of the obligation to notify the merger.
29. **What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?**

If the parties provide insufficient information, the DCCA will usually grant the parties a deadline to submit the relevant information.

If the parties deliberately provide incomplete or misleading information, or fail to comply with an obligation to submit a full-form notification, this may result in the rejection of the notification and the imposition of a fine upon the parties.

Furthermore, an amendment to the Competition Act entered into force on 1 January 2018, introducing a “stop the clock” provision, under which the DCCA may suspend the time limit for a merger review if the participating undertakings fail to disclose information requested by the DCCA within the set time limit.

30. **Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

The DCCA’s decisions on mergers can be appealed to the Danish Competition Appeals Tribunal within four weeks after the parties have been notified of the decision. This option is only available to the addressees of the decisions.

Once a merger decision has been brought before and tried by the Danish Competition Appeals Tribunal, the parties, or anyone with a legal interest in the matter, may bring the case before the Maritime and Commercial Court within eight weeks after notification of the decision.

To this date, no decisions on mergers have been appealed to the Danish Competition Appeals Tribunal.

31. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

There has been a trend towards a more economic approach in merger cases, and recent merger decisions from the DCCA illustrate an increasing use of economic evidence, especially in cases concerning consumer-related markets.

Furthermore, there is an increasing tendency among merging parties to withdraw notifications in cases where it seems highly likely that the merger will otherwise be prohibited. Thus, even though the DCCA has only prohibited one merger to date, this tendency may indicate that the DCCA’s approach to assessing mergers is becoming stricter.

Finally, we have seen an increase in the number of merger filings over the last couple of
years. In 2018 the DCCA approved 52 mergers which is a small increase from the 49 approved in 2017.

32. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

On 1 January 2018, a number of amendments to the Competition Act concerning, inter alia, merger control entered into force. The amendments introduced a “stop the clock” provision, under which the DCCA may suspend the time limit for a merger review if the participating undertakings fail to disclose information requested by the DCCA within the set time limit. This amendment corresponds to the EU merger regime.

Further, the amendments bring along changes and clarification to the regulation of merger commitments. According to the current wording of the Competition Act, the undertakings involved can propose commitments during the merger review and by doing so affect the time limits for the review. By altering the wording in the relevant provisions, the proposal seeks to ensure that only binding commitments, as opposed to non-committal suggestions, will obtain procedural effect.